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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 432

FRANK PALUMBO, *Petitioner,*

v.

HONORABLE J. CULLEN GANEY, Judge of the United States District Court for the Eastern District of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Frank Palumbo, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 5, 1951.

OPINIONS BELOW

No opinions were written below.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1951 (R. 11). The jurisdiction of this Court

is invoked under the provisions of 28 U. S. C. (Supp. IV) 1254(1).

QUESTIONS PRESENTED

1. Whether a witness who has once appeared voluntarily before the Grand Jury, without subpoena, and who thereafter refuses to return when directed by a Special Assistant to the Attorney General of the United States to do so, and is not thereafter subpoenaed, may be attached for a criminal contempt for thus not returning to testify.

2. Whether, in the circumstances of this case, after it appears without contradiction that the witness was never subpoenaed, but the district judge none the less refuses to dismiss the proceeding for attachment for criminal contempt, mandamus is available to vacate the order of attachment.

CONSTITUTIONAL PROVISION, STATUTES, AND RULE OF COURT INVOLVED

1. The Fifth Amendment provides, in pertinent part, that—

> No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *

2. 18 U. S. C. (Supp. IV) 401 provides:

> § 401. **Power of court**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

3. Rule 17(g) of the Federal Rules of Criminal Procedure provides as follows:

> (g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

STATEMENT

On April 9, 1951, Frank Palumbo, the petitioner herein, testified before a Grand Jury empanelled in the Eastern District of Pennsylvania to investigate violations of federal statutes (R. 1, 3). He had appeared without a subpoena, and after testifying he was released "until such time as he would be notified by telephone to reappear before the said Grand Jury" (R. 3).

Thereafter, in October 1951, the petitioner was notified by one Morris, who appears to have been an assistant to Special Assistant to the Attorney General Vincent P. Russo, that his presence before the Grand Jury would be again required on October 9 (R. 4). On that day, petitioner advised Morris by telephone of his inability to appear, because of a business engagement out of town (R. 6), whereupon, his call being transferred to Mr. Russo, petitioner agreed to be present at the Grand Jury's next session on October 16 (R. 7). On October 16, petitioner did not appear (R. 4, 7), and the Chief Deputy Marshal for the District was unable to locate him (R. 8-9).

At no time was a subpoena requiring petitioner's attendance before the Grand Jury ever served upon him.

On October 19, Special Assistant to the Attorney General Max H. Goldschein filed in the district court a petition setting forth the following facts, which charged that petitioner "wilfully, deliberately and contumaciously fails and refuses to reappear before the Grand Jury as ordered", i. e., as ordered by Mr. Russo, and which prayed that the district court issue an order "to attach the body of the

aforesaid Frank Palumbo, * * * and to bring him into this Honorable Court for the purpose of having him appear and answer to a charge of Criminal Contempt" (R. 5). Nowhere in the Petition for Attachment or in any of the affidavits attached thereto is there any allegation or even suggestion that petitioner was ever served with a subpoena, either in April or October.

The respondent, Judge Ganey, thereupon issued an order of attachment conformably to the prayer of the petition, "for the purpose of having [Palumbo] appear and answer to a charge of criminal contempt" (R. 1, 9).

A motion to dismiss the attachment (R. 10) was denied on October 29, 1951 (R. 2), whereupon petitioner, reciting the foregoing circumstances in detail, sought a writ of mandamus in the court below to direct the respondent "to vacate and expunge the Order of the Court ordering the United States Marshal to attach the body of Frank Palumbo" (R. 1-3).

The Court of Appeals denied the petition for mandamus, without opinion, a week after it was filed (R. 11).

REASONS FOR GRANTING THE WRIT

I. But for the respondent's ruling in this case, we should have considered too clear for argument the proposition that the prerequisite for an attachment for contempt was the issuance and service of a valid subpoena. As early as 1795, in the predecessor of the trial court here, it was ruled that an attachment could only issue in a case where the subpoena has been actually served. *United States* v. *Caldwell*, 2 Dall. 333 (C. C. D. Pa.) (Paterson, Circuit Justice, and Peters, District Judge). Such intervening federal cases as there are lay down the same rule, *viz.*, no attachment in the absence of a subpoena, validly served. *In re Attachment of Spencer*, MacA. & M. (11 D. C.) 433; *Samples* v. *United States*, 121 F. 2d 263, 266 (C. C. A. 5), certiorari denied, 314 U. S. 662. Even the witness's indorsement of "Accepted" on a subpoena duly issued will not authorize an

attachment against him. *Dreskill* v. *Parish,* 5 McLean 213, Fed. Case No. 4075 (McLean, Circuit Justice). Similarly, Rule 17(g), F. R. Crim. P. (*supra,* p. 3), presupposes disobedience of "a subpoena served upon him" and Form 22, F. R. Crim. P., 327 U. S. at 890, "Warrant for Arrest of Witness," recites that "he wilfully failed to appear after having been served with subpoena * * *."[1] Here the petition for attachment is at some pains to avoid any reference to the service of a subpoena.

Disobedience of the lawful "order * * * or command" of a court is, to be sure, punishable as a contempt under 18 U. S. C. (Supp. IV) 401(3), *supra,* p. 2, but here no order of the court is alleged or shown. Neither the respondent nor any other judge directed petitioner to return to testify before the Grand Jury or to appear there. Since no order of the court is involved, there can of course be no disobedience thereof. *Berry* v. *Midtown Service Corp.,* 104 F. 2d 107 (C. C. A. 2); *Morgan* v. *United States,* 95 F. 2d 830 (C. C. A. 8).

The only instance in which disobedience of a prosecutor's order might have exposed a witness to punishment was under former R. S. 877, 28 U. S. C. (1946 ed.) 655, which provided that witnesses for the Government "shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; * * * " See *Blackmer* v. *United States,* 284 U. S. 421, 433; *In re Attachment of Spencer, supra.* But R. S. 877 was repealed in the revision of the Judicial Code, see Sec. 39 of the Act of June 25, 1948, 62 Stat. at 992, and the clause, "not to depart without leave of the court or district attorney," does not now appear in crim-

[1] Since the attachment here recites on its face that it is "for the purpose of having him appear and answer to a charge of criminal contempt" (R. 9), it is not necessary to inquire into the wholly different power to attach in order to require the witness's attendance to testify. See *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 612-613, pointing out that the arrest there considered was not one for contempt.

inal subpoenas. See Form 20, F. R. Crim. P., 327 U. S. at 889. But it is not necessary to inquire whether the repeal of R. S. 877 and the changed form of subpoena would permit a duly subpoenaed witness to depart with impunity in the absence of leave granted by the prosecutor, for here the petitioner was never subpoenaed. No subpoena was ever served, and the petition for attachment pointedly fails to allege that one was ever issued.

II. "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * As extraordinary remedies, they are reserved for really extraordinary causes." *Ex parte Fahey,* 332 U. S. 258, 259-260. The power of this Court to issue the writ of mandamus directly to a district court "will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken." *Ex parte United States,* 287 U. S. 241, 248-249. Since, however, the present case deals with the issuance of a writ of mandamus by a court of appeals, the questions which divided this Court in *Ex parte Peru,* 318 U. S. 578, do not arise, and the primary issue here is whether the circumstances presented are sufficiently unusual to call for the admittedly extraordinary remedy of mandamus directed to a judicial officer.

We think that they are. Even though the proposition that no attachment can issue for failure to obey a prosecutor's order in the absence of a subpoena duly served is so clearly settled that, even in the event of conviction, petitioner is certain to be freed on appeal (or, if need be, on certiorari here), we think that this record still demonstrates the need for extraordinary intervention, on at least two grounds.

First. The present contempt proceedings are on their face so utterly devoid of any basis in law that it is literally outrageous that any individual should even have to stand trial on the charge made against this petitioner, viz., disobedience of a prosecutor's order. While in a technical sense there was probably jurisdiction to proceed, the notion

that disobedience of a prosecutor's order involves a contempt of court is so utterly far-fetched that no person should be required to give bail, stand trial, and take an appeal before he is free of the restraints, actual or potential, to which the present charge subjects him. The facts being substantially undisputed, there is moreover little likelihood that the respondent will change his views of the law. This would necessitate an appeal, with its attendant expense and delay.

We submit that the interest in freedom from a charge of criminal contempt for failure to obey a prosecutor's order is at least as much entitled to immediate judicial protection as the right to a jury trial in a civil cause. Mandamus is of course available to protect a litigant whose action for breach of contract was erroneously transferred to the equity side of the court. See *In re Simons*, 247 U. S. 231, 239, where this Court, *per* Holmes, J., said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake."

And the court below has granted mandamus within the last few months to compel a jury trial on the issues of damages, on the view that "Appeal, after an abortive trial to the court, would be a clearly inadequate remedy." *Canister Co.* v. *Leahy*, 191 F. 2d 255, 257 (C. A. 3), pending on certiorari, No. 402, this Term, filed October 27, 1951. We submit that appeal after a trial in the present situation would be an equally inadequate remedy, particularly where, as here, the individual's liberty is at stake. And the difference in the attitude of the court below in saving a corporate defendant a trial on the issue of damages, holding mandamus to be available, and in not saving an individual defendant a trial on the issue of whether he is in contempt for disobedience of a prosecutor's order to appear to tes-

tify without service of a subpoena, holding mandamus to be unavailable, assuredly presents grounds for review by this Court.

Second. The present case unfortunately does not reflect an isolated instance of aberration in the heat of litigation. It is much more serious than that. It is simply the latest manifestation of a consistent lawlessness in a single phase of law enforcement arising out of the same Grand Jury investigation under the direction of the same prosecutor. Other instances of that official's disregard of legal rules have already been brought here and redressed by this Court. See *Hoffman* v. *United States*, 341 U. S. 479, reversing 185 F. 2d 617 (C. A. 3) (criminal contempt proceeding against witness who invoked his privilege against self-incrimination); *Greenberg* v. *United States*, 341 U. S. 944, vacating 187 F. 2d 37 (C. A. 3) (same);[2] *Palermo* v. *Ganey*, 340 U. S. 923 (allegedly improper subpoena; case rendered moot through issuance of proper subpoena after filing of petition for certiorari in this Court). The present case, which involves the attempt to punish as for a criminal contempt a witness who was never subpoenaed, for disobedience of the order of a prosecutor, not of a court, is the latest in the series.

It is of course settled that mandamus is properly invoked where there has been a settled and consistent disregard of a particular Rule prescribed by this Court. *McCullough* v. *Cosgrave*, 309 U. S. 634; cf. *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U. S. 701. We submit that mandamus is likewise an appropriate remedy where there is a persistent disregard of the Rules generally, and that accordingly the writ should have been issued, by way of summary and prophylactic remedy, to halt the abuses already reflected by the other litigated phases of the same Grand Jury investigation under the direction of the same prosecutor.

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[2] The *Greenberg* case was remanded for reconsideration in the light of the subsequently announced *Hoffman* decision, and was reargued in the court below on October 15, 1951.

III. It may be that the real reason underlying the petition for attachment herein was a desire to insure petitioner's appearance to the end that he might then be served with a subpoena. But even on the face of the present record, without more, this is an instance of an individual under attachment and required to give bail (R. 9) and face trial on a charge of criminal contempt, the contempt consisting of his failure or refusal to obey the order of a prosecutor to appear and testify, without ever having been properly subpoenaed.

We think that the record itself presents so flagrant a departure from accepted rules of criminal procedure as to call for the most drastic and extraordinary judicial remedy. We think that a writ of mandamus should have been issued by the court below to halt at the threshold the perversion of process disclosed by the papers before it. And we think that this Court should now review the entire proceeding to declare in unmistakable terms that in our system prosecution and adjudication are not yet so inextricably intertwined that disobedience of a prosecutor has become punishable as a contempt of the court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1951.